

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD A. BARSCH,

No. C 07-00615 SI

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFF'S DUE PROCESS
CLAIM**

v.

MICHAEL O'TOOLE, et al.,

Defendants.

By order filed October 31, 2007, the Court granted in part defendants' motion for summary judgment, and directed further briefing on plaintiff's due process claim. The Court has reviewed the parties' supplemental papers and evidence, and for the reasons set forth below, GRANTS summary judgment in favor of defendants on plaintiffs' due process claim.¹

LEGAL STANDARD

Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the

¹ The Court notes that plaintiff's supplemental brief is largely devoted to arguing the merits of claims which were resolved in the October 31, 2007 order. In light of plaintiff's pro se status, the Court has considered those arguments. However, the Court finds no reason to change its analysis.

1 absence of any genuine issues of material fact, the burden of production then shifts so that the non-
 2 moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that
 3 there is a genuine issue for trial.” *See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d
 4 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

5 In judging evidence at the summary judgment stage, the Court does not make credibility
 6 determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the
 7 non-moving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v.*
 8 *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509
 9 (9th Cir. 1991). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e).
 10 Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues
 11 of fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th
 12 Cir. 1979).

14 DISCUSSION²

15 Plaintiff alleges that his rights were violated because he has been “unlawfully deprived of his
 16 property that was illegally removed from plaintiff’s residence.” Complaint at 11:13-14. The Complaint
 17 also alleges that “Court order H40751 dated 5/22/06 caused plaintiff’s property to be sold and the
 18 proceeds given to Wayne Barsch. This was done in spite of plaintiff’s written objection that such action
 19 was illegal.” *Id.* at 11:14-17. Plaintiff’s supplemental brief regarding the due process claim states, in
 20 its entirety:

21 RE note 9. Plaintiff did not have a complete listing of property taken from plaintiff’s
 22 residence until after this complaint was filed and defense counsel as part of their
 23 response furnished a full transcript of Wayne Barsch’s trial which was over a year since
 the actual incident had occurred.

24 Plaintiff filed with the Assistant District Attorney’s office four documents relative to this
 25 incident by hand delivering said documents to the assistant district attorney’s office in
 26 Hayward, Ca. These documents were never responded to or even acknowledged as
 having been received other than the date and time stamped by the clerk when plaintiff
 presented such documents to the Alameda County District Attorney’s Hayward, Ca.
 office.

28 ² The Court incorporates the background section of the October 31, 2007 order.

1 Supplement Brief at 6. Plaintiff has also submitted two invoices/shipping documents, one dated October
2 14, 1960, the other dated July 3, 1964, showing that firearms were shipped to Edward A. Barsch.
3 Plaintiff's Request for Judicial Notice, "Enclosures 1 and 2."

4 "The base requirement of the Due Process Clause is that a person deprived of property be given
5 an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Brewster v. Bd. of Educ.*
6 *of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) (quoting *Armstrong v. Manzo*, 380
7 U.S. 545, 552 (1965)). It is undisputed that plaintiff had notice that the weapons were seized in
8 connection with the criminal case against his son Wayne. It is also undisputed that plaintiff knew that
9 the weapons were subject to being sold and/or destroyed; plaintiff testified in his deposition that while
10 the criminal case against Wayne was pending, he submitted letters to the District Attorney's Office
11 asserting his ownership of the weapons. *See* November 5, 2007 Hom Decl., Ex. E (Barsch Depo. at 52).
12 In addition, in the criminal case against Wayne, plaintiff filed, and subsequently withdrew, a demand
13 for restitution from Wayne. *See* August 24, 2007 Hom Decl. Ex. B (May 22, 2006 transcript at 000067-
14 68). Following Wayne's conviction, the seized weapons were sold or destroyed pursuant to court orders
15 issued by the Alameda Superior Court. *See* May 4, 2007 Hom Decl. Ex. B at 000074-85.

16 On this record, the Court concludes that plaintiff has not raised a triable issue of fact to defeat
17 summary judgment on his due process claim. Plaintiff has not submitted any evidence suggesting that
18 he did not have notice or an opportunity to be heard on his claim that he was the rightful owner of the
19 seized weapons prior to their sale/destruction. *Cf. Jordan v. City of Lake Oswego*, 734 F.2d 1374, 1376
20 (9th Cir. 1984) ("That he chose not to avail himself of this opportunity does not detract from our
21 conclusion that the procedures utilized prior to his termination were sufficient to accord with the due
22 process requirements of the federal Constitution.).

23 24 CONCLUSION

25 For the foregoing reasons, the Court hereby GRANTS defendants' motion for summary
26 judgment on plaintiff's due process claim and consequently GRANTS defendants' motion for summary
27 judgment in its entirety. (Docket No. 32). The Court GRANTS in part and DENIES in part plaintiff's
28 request for judicial notice. The Court accepts into evidence the two invoices/shipping documents

1 attached to the request. However, the Court strikes the remainder of plaintiff's request as it contains
2 improper argument.

3
4 **IT IS SO ORDERED.**

5 Dated: November 26, 2007



7 SUSAN ILLSTON
8 United States District Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28